No. 08-1371

In The Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[*]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the ruling below threatens the fundamental right of students to associate for a common cause and purpose, and in particular student groups who adhere to common religious beliefs. The decision of the Court of Appeals is contrary to the ideals of academic freedom recognized by this Court.

[*] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

STATEMENT OF FACTS

The Rutherford Institute, as *amicus curiae*, adopts by reference the Statement of Facts set forth in petitioner's brief filed with this Court. Careful scrutiny must be given to critical facts surrounding the governmental burdens imposed by the Hastings College of the Law of the University of California on the freedom of association and expression of the student chapter of the Christian Legal Society ("CLS"). Not only did Hastings attempt to exclude CLS from campus facilities because of its refusal to accept non-adherents into membership or leadership, it also "invited" CLS to discuss changing the core religious commitments reflected in its bylaws as a condition to obtaining recognition of CLS as a campus organization.[1] Such exclusion, inequitable treatment, and coercive conduct does violence to the very idea of a university and is contrary to centuries old traditions of free speech and academic freedom on the campuses of public institutions of higher learning in this country.

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[1] *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane,* 2006 U.S. Dist. LEXIS 27347 at *12 (N.D. Cal., April 17, 2006) (As Amended May 19, 2006). At the time Hastings sought to force CLS to accept in membership and leadership persons opposed to CLS's core values, Hastings permitted another student group (La Raza) to restrict its voting membership to students of Latino or Mexican descent. Joint Appendix 182, 319.

SUMMARY OF ARGUMENT

This case is but a 21st century reincarnation of the exclusionary policies invalidated in *Widmar v. Vincent,* 454 U.S. 263 (1981). Worse here, however, is the attempt by the Hastings College of the Law to force CLS to bargain away core religious beliefs in exchange for recognition and equal access to university facilities on the same basis provided to other student groups. Hastings' actions run contrary to longstanding traditions of intellectual freedom of association and speech on public university campuses, which historically have been guided by broadly-drawn policies providing venues for expression of all viewpoints, none excluded. Those principles, grounded in the First Amendment and academic freedom, must not be permitted to yield to the imposing hand of state censorship. The history of accommodation and acceptance of diverse student viewpoints in state university communities, and the necessity of academic freedom to the very idea of a public university, require reversal of the Ninth Circuit's decision in this case.

The early historical record in public universities reveals a pattern of freedom of association for student organizations. For example, Thomas Jefferson specifically approved of regular religious meetings for worship and teaching by students of differing sects on the public campus of the University of Virginia. When the University was established in 1819, Jefferson promised that scholars at Virginia could enjoy the "illimitable freedom of the

human mind," granting students free choice in the selection of courses and removing compulsory chapel attendance. These liberal policies allowed for maximum diversity of human inquiry and have continued to this day. In the 2006 Joint Statement on Student Academic Freedom, the American Association of University Professors ("AAUP") and other national educational groups have reaffirmed that "[c]ampus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, *except for religious qualifications* which may be required by organizations whose aims are primarily sectarian."[2]

Grounded in this Jeffersonian tradition, this Court's decisions --- most prominently *Widmar v. Vincent, supra* --- have bolstered longstanding principles of free inquiry and free association, especially on university campuses. The expansive freedoms to associate, to speak and to learn in these venues has contributed to distinguishing American universities from many others in the world in terms of the vitality of expression, exploration, creativity, advocacy and social betterment. To restrict artificially, and indeed to stigmatize, social and cultural viewpoints by excluding student organizations whose values may diverge from an institution's preferred viewpoints, and, indeed, to attempt to coerce abandonment of religious exercise

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[2] *See Joint Statement on Rights and Freedoms of Students,* AAUP POLICY DOCUMENTS AND REPORTS 275 (2006) (emphasis added).

by withdrawing governmental benefits --- as the Hastings College of the Law seeks to do here --- inflicts injury not only upon the rights of the students in question, but upon the university community and society as a whole.

It is not hyperbole to argue that the resolution of the exclusionary issues in this case ultimately threatens the future of public education as we know it. The centuries-old tradition in public universities of "freedom for the thought that we hate" has produced extraordinary creativity, vital debate, and countless contributions to American and world civilization. That tradition, mirrored in principles followed in numerous decisions of this Court, was perhaps first (and best) recounted by Justice Brandeis in *Whitney v. California*, where in considering the views of "those who won our independence," Brandeis observed: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form."[3] Instead, they knew that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[4] That path should likewise be followed in the decision of this case.

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[3] *See Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

[4] *Id.* at 375.

ARGUMENT

Introduction

Thirty years ago, in *Widmar v. Vincent,* 454 U.S. 263 (1981), this Court vindicated the rights of a student religious organization denied access to a public university classroom for meetings for worship and religious discussion. *Id.* at 265. The exclusion of the student group based on its religious speech violated the Free Speech Clause of the First Amendment. *Id.* at 273. Despite the decision in *Widmar*, student religious groups have nevertheless required continued intervention in the face of repeated First Amendment infringements by public authorities. *See, e.g., Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Va.,* 515 U.S. 819 (1995); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226 (1990); *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 555 (1986) (Powell, J., dissenting); *see also,* Mark W. Cordes, *Religion as Speech: the Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty,* 38 Sw. U.L. Rev. 235, 247 (2008) ("[These] cases had generally the same fact pattern, similar to that in *Widmar*.")

The present case is but a 21st century reincarnation of *Widmar,* only worse in that Hastings College of the Law seeks to force a religious group to abandon core beliefs to gain equal access to university facilities on the same basis provided to other student groups. Just as the University of

Missouri at Kansas City asked this Court to uphold its denial of access to Vincent's Bible study on university facilities, Hastings asks this Court to uphold its bar on CLS's use of university facilities because of its religious beliefs, but goes one step further by offering its facilities on the condition that CLS abandon core values grounded in the Holy Scriptures. In Orwellian fashion, and notwithstanding *bona fide* religious objection, Hastings suggests that it may lawfully withdraw university benefits to CLS because CLS refuses to adhere to the university's viewpoint on sexual orientation. To obtain recognition and benefits, Hastings would require CLS to amend its bylaws to permit individuals who reject its core values to become members and/or serve as leaders. As applied to CLS, Hastings thus would compel CLS to associate with, and enfranchise within the organization, the very individuals who engage in, and/or advocate, conduct that the group with its Christian worldview and core beliefs disavows. If accepted, can there be any doubt that this indirectly coerced means of "packing the membership" will not result in a complete and total change of the organization's core values, purposes and governance?

This Court's "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 269 (citing *Healy v. James,* 408 U.S. 169, 180 (1972)). Moreover, this Court has made clear that even policies of ostensible neutral application may not operate in a discriminatory

manner to deny freedoms guaranteed by the Bill of Rights, including Free Speech and Free Exercise of Religion, which require compelling state interests and strict scrutiny to survive. *Employment Division v. Smith*, 494 U. S. 872 (1990); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larsen v. Valente,* 456 U.S. 228 (1982); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). And the Court has been sensitive to state policies that send "a message . . . that [citizens] are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Here, Hastings forces a Hobson's choice upon student organizations with legitimate creeds that conflict with the school's official orthodoxy: the student organization may either adhere to central tenets of faith and accept exclusion from university facilities, or adhere to the university's viewpoint and accept as members and leaders those who otherwise stand against the group's core values. With this sort of compelled choice and censorship, and interference with the governance of a religious organization, all groups and members of the Hastings academic community are at risk, and indeed, their rights, chilled and diminished. Students and student groups who subscribe to core values that contradict official orthodoxy must now suffer not only unequal treatment, but the brand and stigma of state disfavor, and banishment from public privileges and

benefits that all other student groups freely enjoy. The Hastings ultimatum imposes a severe burden on First Amendment rights and student academic freedom.

No doubt there are many "pigeon-holes" of constitutional jurisprudence that fit this case, but simplistic formulations are an inadequate substitute for two predicate questions: "Why do students on state university campuses associate in organized student groups?" and "Why should the state-prescribed orthodoxy in this case be immune from cardinal principles reflected in the First Amendment and longstanding tradition of student academic freedom?" In responding to these questions, timeless values espoused by the Framers provide important perspectives that are pertinent to the resolution of the issues in this case. The history of accommodation and acceptance of free association, and of freely expressed, diverse student viewpoints, within the academic community, and the imperative of academic freedom to the idea of the university, are relevant and critical to the decision of this case.

The Early Historical Record of Public Universities Reveals a Pattern of Freedom of Association For All Student Organizations

Formal student association on college campuses is not a Twentieth Century phenomena. Indeed, the history of organized student activities on university campuses can be traced to the American colonial period, including those closely associated

with Thomas Jefferson.[5] Early student activities were based on religious themes and strong discipline.[6] They evolved to literary organizations, debating societies, and athletic clubs that included organized social events, debates, or sporting contests.[7] Perhaps the most well-known example of an early student organization during this period was *Phi Beta Kappa*, formed in 1776 as a literary and debating society at the College of William & Mary in Virginia.[8] Founded by five *students*, its Greek letters stand for love of learning.[9] Since its inception, "the Society has embraced the principles of freedom of inquiry and liberty of thought and expression."[10]

Thomas Jefferson obtained his undergraduate and legal education at William & Mary, but possessed a grander vision for a university, which he described as having "a plan so broad and liberal and modern, as to be worth patronizing with the public support, and be a temptation to the youth of other States to come and drink of the cup of knowledge and

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[5] *See* NORBERT W. DUNKEL & JOHN C. SCHUH, ADVISING STUDENT GROUPS AND ORGANIZATIONS 18 (1997).

[6] *Id.*

[7] *Id.*

[8] *See* the website of The Phi Beta Kappa Society, http://www.pbk.org/infoview/PBK_InfoView.aspx?t=&id=8 (last viewed February 2, 2010).

[9] *Id.*

[10] *Id.*

fraternize with us."[11] After years of planning and persuasion by Jefferson, James Madison and others, the Commonwealth of Virginia chartered the University of Virginia in 1819, governed by a Rector and Board of Visitors, with Jefferson as its first Rector.[12] The question of the propagation of diverse religious views at the University of Virginia --- in particular, relating to Christianity --- was presented to Jefferson early in his tenure. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University (of whom James Madison was one), Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The

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[11] *See* JOHN S. PATTON, JEFFERSON, CABELL AND THE UNIVERSITY OF VIRGINIA 16 (1906), quoting from a Jefferson letter to British scientist, Joseph Priestly.

[12] *See* The Jefferson Trust, http://www.alumni.virginia.edu/support/jeffersontrust/overview.aspx (last viewed February 2, 2010).

want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to remain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be*

> *erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor*. . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . .[13]

Simply put, Jefferson was not opposed to conflicting religious views being advanced on the premises of the University of Virginia. In order to perpetuate and accommodate diverse religious beliefs and exercise of the students of the University of Virginia, Jefferson recommended that students be allowed to associate on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Indeed, he even approved the practice of the different religious denominations holding weekly worship services at the Charlottesville Courthouse:

> In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the

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[13] 19 THE WRITINGS OF THOMAS JEFFERSON 414-17 (Memorial ed., 1904) (emphasis added).

> month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others' preachers, and all mix in society with perfect harmony.[14]

Thus, even the "wall of separation between Church and State" attributed to Jefferson did not exclude religious education and viewpoints from the publicly run University of Virginia, nor for that matter did it prevent sectarian meetings in what Jefferson termed to be the "common temple" at the Charlottesville courthouse.[15]

In granting access for religious services and allowing sectarian views on campus, Jefferson also expanded religious liberty on the University of Virginia's campus, in a fashion that was atypical for some higher educational institutions of his day, by relaxing traditional protocol and eliminating

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[14] 4 THE WRITINGS OF THOMAS JEFFERSON 83 (Paul Leicester Ford, ed. 1892-1999).

[15] *See also,* Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause,* 40 Akron L. Rev. 623, 640 (2007) (During his Presidency and only "two days after he penned his famous 'wall of separation' letter, President Jefferson attended, along with members of both chambers of Congress, religious services in the Hall of the House of Representatives.").

compulsory chapel attendance.[16] This did not mean that Jefferson was apathetic to religion or that he discouraged students from attending services. On the contrary, it was his wisdom to leave these decisions to the student's discretion. As the University's regulations drafted pursuant to Jefferson's views provided:

> Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.[17]

With respect to the locale for student worship on the University's campus, "[i]n his plans, Mr. Jefferson himself suggested that there should be space for a building to be used for religious worship under what he called 'impartial regulation.' In the meantime two

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[16] *See* JENNINGS L. WAGONER, JR., JEFFERSON AND EDUCATION 139 (2004).

[17] *Regulations of the University,* (Oct. 4, 1824) Ch. II, Section 1 (emphasis added).

of the best rooms in the main building were to be set apart for the purpose."[18]

The intellectual freedom which Jefferson espoused was guided by a broadly-drawn concept of freedom in which all viewpoints could be expressed within the precincts of the university, few, if any, excluded. One of the first student organizations at the University was the Jefferson Literary and Debating Society, which continues to this day as "the oldest continuing existing collegiate debating society in North America and indeed the second-oldest Greek-lettered organization in the United States."[19] It was founded "on July 14, 1825, by sixteen disgruntled members of the now-defunct Patrick Henry Society."[20] Other student organizations abounded early on at the University. "In 1826, the Medical Society appears, then in 1831, the Academics Society," the latter founded by students as an "association for mutual improvement in the Art of Oratory." [21] It merged in 1835 into a "new body they

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[18] THE CENTENNIAL OF THE UNIVERSITY OF VIRGINIA *1819-1921* at 6-7 (1922). Building complications later caused this plan to be foregone and Jefferson instead suggested that students and faculty hold worship services in a room in the Rotunda, which occurred until mid-1837. *Id.* at 8.

[19] *See* the website of The Jefferson Society, http://www.jeffersonsociety.org/aboutus/index.php (last viewed February 2, 2010).

[20] *Id.*

[21] *See* JOHN S. PATTON, *supra* note 11, at 237, 245-46.

called the Washington Society, that its name, recalling the deeds of the 'Illustrious Father of American Liberty,' might animate them with the desire of using the power there attained for the good of their country, and the weal of their country men."[22] Some students left the Washington Society "to form the Philomathean Society in 1849 and the Parthenon Society in 1852."[23] Later followed the Columbian Society, as well as student magazines, the *Collegian*, the *Virginia University Magazine,* and the *Jefferson Monument Magazine*.[24] Perhaps the most remarkable initiative in the dynamic student organizational life of the University of Virginia was "a particular movement which had its rise in 1858" at the University, the Young Men's Christian Association ("YMCA"). [25] "For a number of years *prior* to the formation of the YMCA, student prayer meetings, initiated and maintained through their own efforts, were held regularly on Sunday afternoons. . . ."[26] These student-initiated associations led to the formation of the YMCA organization which now serves 45 million people

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[22] *See* the website of the Washington Literary Society and Debating Union at the University of Virginia, http://www.student.virginia.edu/~wash-soc/history.html (last viewed February 2, 2010).

[23] *Id*.

[24] *See* JOHN S. PATTON, *supra* note 11, at 254-56.

[25] CENTENNIAL, *supra* note 18, at 9.

[26] *Id*. at 12. (emphasis added).

worldwide through autonomous organizations in 120 nations.[27]

Alexis De Tocqueville worried in his 1831 survey of emerging America that its democratic institutions would compel members of the community "to live alike," in private as well as public life.[28] However, he came to reject this hypothesis, recognizing that "no state of society or laws can render men so much alike, [because] education, fortune, and tastes will always interpose some differences between them."[29] Despite concern over democracy's proclivity to social uniformity, De Tocqueville observed that Americans "will set up, close by the great political community, small private societies, united together by similitude of conditions, habits, and customs." This dynamic is evident in the several student organizations at Jefferson's University, and continues to this day within student organizations on public university campuses across the country, where faculty, administrators, and students generally acknowledge that student groups provide invaluable discourse, learning, advocacy and benefit for both the campus community and for society at large. Those principles, grounded in Free Speech and academic freedom, must not now be

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[27] http://www.YMCA.net/international (last viewed January 27, 2010).

[28] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 215 (1831) (Vol. II., Knopf 1956).

[29] *Id*.

permitted to yield to the imposing hand of state censorship.

Principles of Academic Freedom and Free Speech Provide Heightened Protection to Student Speech and Association

A university has been described as "a city, or a city within a city. . . . a community of learners, bent upon corporate life and action."[30] John Henry Newman declared more broadly the nature of the university in his classic work, *The Idea of a University*:

> It is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error

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[30] JACQUES BARZUN, THE AMERICAN UNIVERSITY 244 (1968). Barzun explained the academy as follows: "*Universitas* originally means a group, a collection, a community, . . . a *universitas studiorum* means a grouping of studies, hence a community of learners, bent upon corporate life and action." More colorfully, it has been said to be "a Paradise, Rivers of Knowledge are there, Arts and Sciences flow from thence . . . bottomless depths of unsearchable Counsels there." JOHN DONNE, Sermon No. 11, THE SERMONS OF JOHN DONNE, from THE WORKS OF JOHN DONNE, Vol. 4, 227 (1834).

> exposed, by the collision of mind with mind, and knowledge with knowledge. It is the place where the professor becomes eloquent, and is a missionary and a preacher, displaying his science in its most complete and most winning form, pouring it forth with the zeal of enthusiasm, and lighting up his own love of it in the breasts of his hearers. It is the place where the catechist makes good his ground as he goes, treading in the truth day by day into the ready memory, and wedging and tightening it into the expanding reason. It is a place which wins the admiration of the young by its celebrity, kindles the affections of the middle-aged by its beauty, and rivets the fidelity of the old by its associations.[31]

Recognition of the significant societal benefits of this collective, communal search for truth continues to this day. In the context of public education, it has been inexorably linked to the vibrancy of free speech rights and the pursuit of knowledge. In *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967), for example, this Court declared that "[o]ur Nation is deeply committed to safe-guarding academic freedom, which is of transcendent value to

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[31] John Henry Newman, *The Idea of a University* (1854), SELECTIONS FROM THE PROSE WRITINGS OF JOHN HENRY CARDINAL NEWMAN FOR THE USE OF SCHOOLS 162-163 (1906).

all of us and *not merely to the teachers concerned.* That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (emphasis added). Likewise, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978), Justice Powell recognized that academic freedom "long has been viewed as a special concern of the First Amendment." Moreover, the constitutional maxim that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" is also appropriately implicated in the context of publicly provided education. *W. Va. State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Likewise, the Court has declared that "[t]he essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957). And when religious coercion occurs --- as it did here when the Hastings Office of Student Affairs approached CLS and "invited [it] to discuss changing"[32] the core religious commitments of its bylaws as a condition to obtaining recognition for CLS by the university --- First Amendment values are chilled and subjected to inappropriate and undue burdens. *Hobbie v. Unemployment Appeals Comm'n*

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[32] *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, supra* note 1, 2006 U.S. Dist. LEXIS 27347 at *12.

of Florida, 480 U.S. 136 (1987); *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Finally, unduly restricting the right of association does irreparable damage to the uniquely American dynamic of organized social advocacy, understanding and betterment. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as th[e] Court has more than once recognized by remarking upon the close nexus between the freedom of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *NAACP v. Button,* 371 U.S. 415 (1963), *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981).

Thomas Jefferson's approach to academic freedom, enjoyed by professors and students alike, marked him ahead of other American public university proctors by approximately 75 years. Jefferson launched the University of Virginia with the promise that scholars could enjoy the "illimitable freedom of the human mind."[33] A later American

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[33] *See* WAGONER, *supra* note 16 at 137 (citing Letter to Nathaniel Bowditch, October 26, 1818; Letter to Joseph Cabell, February 3, 1825) ("Perhaps the most striking feature of the Jeffersonian educational legacy was his dedication of the University of Virginia to the principles of intellectual freedom. At a time when conformity to doctrinal positions of sponsoring denominations was still expected on the part of faculty in both English and American institutions of higher learning, Jefferson launched his university with the promise that scholars at Virginia could enjoy the

model viewed academic freedom in the context of *Lehrfreiheit*, the German origin of "teaching freedom" which distinguished academics, who were civil servants, from other government employees. [34] By the late 1890s, American institutions of higher education, including Harvard and Princeton, had adopted this German model.[35] And in 1915, the newly formed AAUP issued its first report on academic freedom containing a "Declaration of

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'illimitable freedom of the human mind.' In recruiting professors, Jefferson assured candidates that, given the liberal character and tolerant disposition of members of the board, they would in effect have lifetime tenure in their posts and would be unfettered in their teaching. Unlike institutions which the board of trustees determined books that might be used in various classes, the Virginia trustees concurred with Jefferson that the choice of texts should be left with the individual professors since they would be much more knowledgeable about their respective fields than would any member of the board.")

[34] *See* Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 474-75 (2005). The "German thinkers drew from the wellspring of the Enlightenment, which in turn, drew from even deeper currents in intellectual history." MATTHEW W. FINKEN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDON 11 (2009).

[35] *See* J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment"*, 99 Yale L.J. 251, 269-270 n. 73 (1989) ("When Johns Hopkins University was founded in 1876, it was the first university to substitute institutionally a scientific for a religious model of truth.")

Principles" that reflected the German model,[36] which led to the adoption of a "1925 Statement on Principles on Academic Freedom", with a set of interpretive comments added in 1940.[37]

While the latter Principles focused mainly on faculty freedoms, "[t]here is also the question of *student* academic freedom which the Germans would call *Lernfreiheit."*[38] This "learning freedom" also has parallel origins in constitutional jurisprudence, whether in recognition of religious exemption from state requirements infringing on religious liberties, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or in the freedom to hear, learn, and to know, recognized to one degree or another in *Martin v. Struthers*, 319 U.S. 141, 143 (1943), *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), *Thomas v. Collins*, 323 U.S. 516, 534 (1945), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 390 (1969), and *Board of Education v. Pico*, 457 U.S. 853 (1982). Indeed, the Court has emphasized that the *right to know* is "nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Shelton*

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[36] *Id.* at 276 ("[t]he AAUP's *1915 Declaration of Principles* is the single most important document relating to American academic freedom.")

[37] The interpretive comments were revised in 1970, and, in conjunction with the 1940 Statement, comprise the official position of the AAUP on matters concerning academic freedom.

[38] FINKEN & POST, *supra* note 34, at 79 (emphasis added).

v. Tucker, 364 U.S. 479, 487 (1960); *Sweezy*, 354 U.S. at 250.

Here, again, Jefferson was ahead of his time. Although the term *Lernfreiheit* was not then in vogue, the academic freedom Jefferson thought important for professors applied to the university's students as well. A basic ingredient in student freedom was total election of studies. Jefferson observed that he was "not fully informed of the practices at Harvard, but there is one from which we shall certainly vary. . . That is, the holding the students are all to one prescribed course of reading, and disallowing exclusive application to those branches only which are to qualify them for the particular vocations to which they are destined. We shall, on the contrary, allow them uncontrolled choice in the lectures they shall choose to attend, and requiring elementary qualification only, and sufficient age."[39] Accordingly, in regulations adopted on October 4, 1824, the visitors specified that "Every student shall be free to attend the schools of his choice, and no other than he chooses."[40]

One hundred and forty years later, *Lernfreiheit* was acknowledged by the AAUP and other key national education organizations through the implementation of several declarations with

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[39] *See* WAGONER, *supra* note 16, at 139.

[40] *Id.* (citing Letter to George Ticknor, July 16, 1823; University Regulations, October 4, 1824).

respect to student academic freedom.[41] The most recent *Joint Statement on Rights and Freedom of Students* provides, in pertinent part:

> Campus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, *except for religious qualifications which may be required by*

[41] The AAUP's first commentary on academic freedom, entitled *Declaration of Principles,* was first published in 1915. In 1925, it was revised and retitled *Statement on Academic Freedom and Tenure*. These two works culminated in the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure. See supra*, notes 36-37. In 1965, upon recommendation of an AAUP committee on Academic Freedom and Tenure, a committee was formed to prepare a *Statement on Academic Freedom of Students,* which was prepared and subsequently published in 51 A.A.U.P. Bull. 447 (1965). In 1967, the committee reconvened, and with the support of the United States National Student Association, the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Womens and Deans and Counselors, formulated a *Joint Statement on Rights and Freedoms of Students,* which was prepared and subsequently published in 54 A.A.U.P. Bull. 258 (1968). The AAUP's first *Joint Statement on Student Academic Freedom* has been affirmed many times since its inception, most recently in 2006. *See Joint Statement on Rights and Freedoms of Students* 273*,* AAUP POLICY DOCUMENTS AND REPORTS (2006).

> *organizations whose aims are primarily sectarian.*[42]

(emphasis added). This statement not only affirms the AAUP's initial 1968 *Joint Statement,* but includes an additional footnote explicitly recognizing that the "obligation of institutions with respect to nondiscrimination, *with the exception noted above for religious qualifications*, should be understood in accordance with the expanded statement on nondiscrimination in n. 3, above."[43] (referencing a broad nondiscrimination statement that includes sexual orientation) (emphasis added).

Thus, as recently as 2006 the AAUP acknowledged the academic freedom of student religious organizations to *choose* and *exclude* members and leaders, so long as any such exclusion is based on religiously-based sectarian considerations. The AAUP's 2006 *Joint Statement* also contains several other pertinent declarations relating to student academic freedom that apply in this case. These include declarations (a) that students "should be free to organize and join associations to promote their common interests,"[44] (b) that "institutional control of campus facilities

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[42] *Joint Statement* (2006), *supra* note 41, at 275.

[43] *Id.* at 279, n. 8.

[44] *Id.* at 274.

should not be used as a device of censorship,"[45] and (c) that "institutional authority should never be used to duplicate the function of general laws."[46] These important statements on student academic freedom parallel the substantive constitutional rights this Court has long recognized in the precedents previously set forth in this brief.

More Speech is Better Than Less Speech, Especially For Students and Student Organizations

The AAUP explicitly affirms that the intent of its academic freedom principles "is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster." *See* 1940 Statement (with 1970 Interpretive Comments) at 5(2). Prior to the adoption of this Statement, the writings of John Stuart Mill,[47] Thomas Jefferson, and the judicial

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[45] *Id.* at 275.

[46] *Id.* at 276.

[47] J. S. Mill, *Essay on Liberty* (1859) ("Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right."); *see also*, Byrne, *supra* note 35, at 261 ("The judges who pioneered the modern doctrine of free speech followed Mill in arguing that even hateful speech must be tolerated, because such speech may be true.")

opinions of Justices Holmes and Brandeis[48] laid the intellectual foundation for this position, more commonly known as the "marketplace of ideas."[49]

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[48] *Whitney v. California*, *supra* note 3, at 375, n. 3 ("We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors…") (quoting Jefferson); *see also,* Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in* Whitney v. California*,* 29 Wm. & Mary L. Rev. 653, 685 n. 111 (1988) ("A few months after he wrote his opinion in *Whitney,* Brandeis made a trip to Monticello "to pay homage". Letter to Alice Harriet Grady (Sept. 22, 1927), *reprinted in* 5 LETTERS OF LOUIS D. BRANDEIS (citations omitted). He returned home from the visit "with the deepest conviction of T.J.'s greatness". Letter to Alfred Brandeis (Sept. 22, 1927), *id.* In various letters he referred to three different biographies of Jefferson, *id.* at 315, 411, 521, 648, and once described Jefferson as "our most civilized American and true Democrat." Letter to Bernard Flexner (Nov. 16, 1940), *id.* at 648. *See also* A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 478 (1936) ("Brandeis was willing to be called a Jeffersonian")).

[49] *Healy*, 408 U.S. at 180 ("'The college classroom with its surrounding environs is peculiarly `the marketplace of ideas.'"); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the "marketplace of ideas" by suggesting that "the ultimate good desired is best reached by free trade in ideas."); *Whitney,* 274 U.S. at 375 ("[the framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth…") (Brandeis, J., concurring); *see also,* Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development,* 81 Harv. L. Rev. 513, 517 (1968) ("The free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.").

Ultimately "to Brandeis, as to Jefferson, the key to successful democracy lies in the spirit, the vitality, the daring, and the inventiveness of its citizens."[50] All of these thinkers would agree that "[t]o be afraid of ideas, any idea, is to be unfit for self-government."[51] Brandeis was of the view that free speech was the "safety valve" of society. His concurrence in *Whitney v. California* set a standard reflected in the modern Free Speech doctrine of this Court:

> Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order

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[50] *See* Blasi, *supra* note 48, at 686.

[51] *See* ALEXANDER MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 28 (1960).

> cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form*.

274 U.S. at 375-76 (Brandeis, J., concurring) (emphasis added). By silencing and restricting speech and association in the manner the university seeks to do here, viewpoints are driven underground without exposure to the light of reason, individuals are disenfranchised with little or no viable avenue for expression, longstanding religious traditions are stigmatized, and other societal dangers lurk in an environment of mistrust and misunderstanding. For these reasons, state censorship of association and speech in public universities should not be permitted to infringe on the academic freedom of student religious organizations to *choose* and *exclude* members and leaders, based on theological associations and should only be limited, if at all, to the regulation of conduct that imposes concrete injury.

CONCLUSION

Distinguished Jefferson biographer Dumas Malone concludes in *The Sage of Monticello* that "no other American of his generation did more to remove shackles from the mind."[52] Today, as Jefferson envisioned, "the mission of colleges and universities includes not only the intellectual development of students, but also the physical, social, vocational, ethical, and cultural development as well."[53] If this tradition is to continue, the freedom to associate voluntarily on campus for religious (or any other) purposes should not for the first time in our history be made subject to state censorship grounded in political ideology. In keeping with the Jeffersonian tradition of academic freedom, and the line of decisions beginning with *Widmar*, which both recognize the freedom for students to associate on campus on the same basis as other students for legitimate purposes with individuals of one's choice, this Court should now reverse the Memorandum Decision of the Court of Appeals for the Ninth Circuit and remand this case for proceedings consistent with this Court's opinion.

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[52] DUMAS MALONE, THE SAGE OF MONTICELLO 418, Vol. 6 of JEFFERSON AND HIS TIME (1981).

[53] *See* Annette Gibbs, *The First Amendment and College Student Organizations,* 55 Peabody Journal of Education: Issues and Trends in American Education 131-135, Taylor & Francis, Ltd. (Jan., 1978).

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